This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Br 168.88.5

HARVARD COLLEGE
LIBRARY

FROM THE BEQUEST OF
CHARLES SUMNER
CLASS OF 1830
Senator from Massachusetts
FOR BOOKS RELATING TO
POLITICS AND FINE ARTS

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Br. 168.88.5

Harvard College Library

FROM THE BEQUEST OF

CHARLES SUMNER, LL.D.,

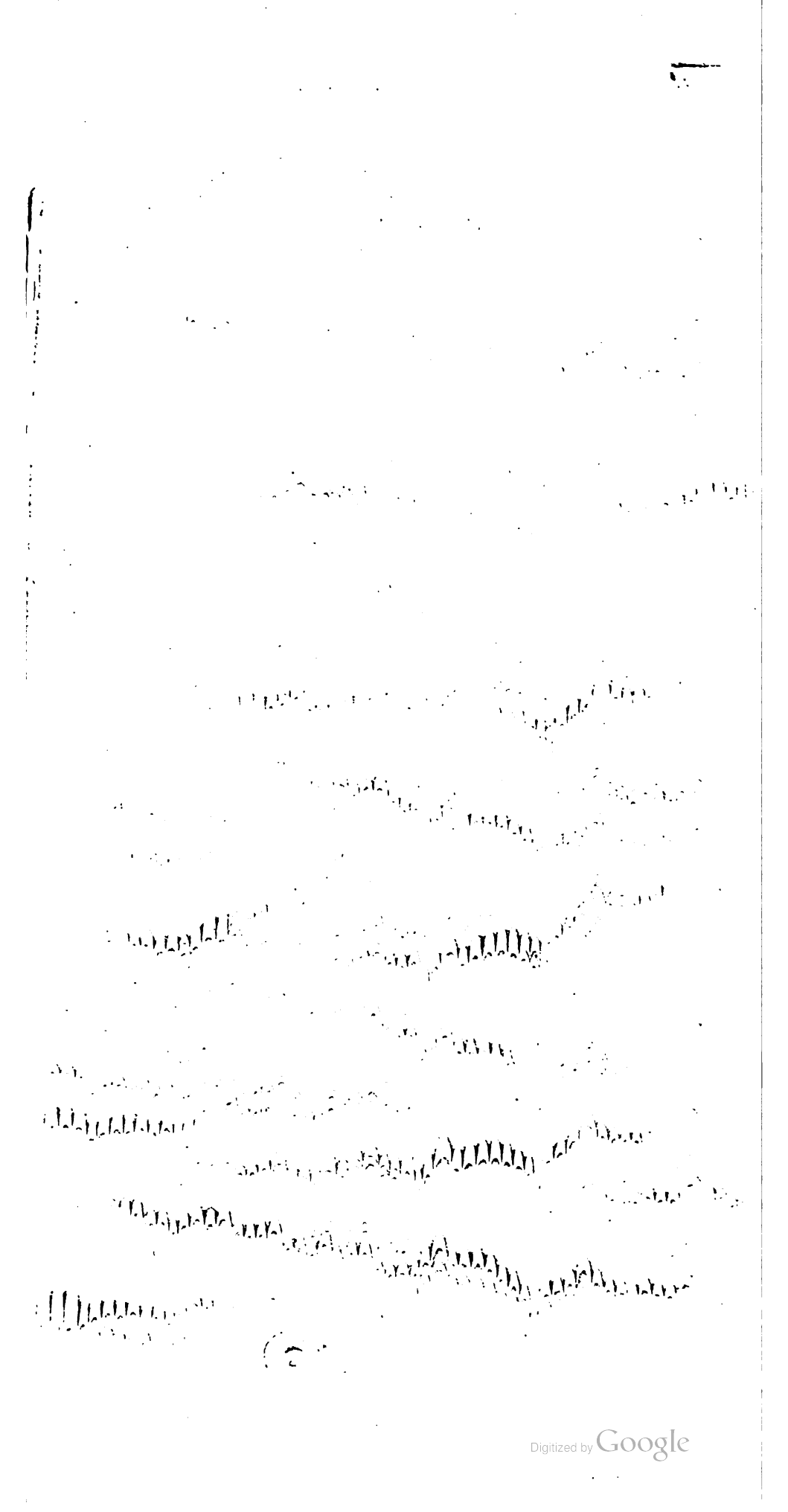
OF BOSTON,

(Class of 1830),

"For books relating to Politics and Fine Arts."

18 Feb., 1889.

Digitized by Google



Digitized by Google

Digitized by Google

WHY THE HISTORY OF ENGLISH LAW IS NOT WRITTEN.

4478

AN INAUGURAL LECTURE

DELIVERED IN THE ARTS SCHOOL AT CAMBRIDGE
ON 13TH OCTOBER, 1888

BY

Frederick William
F. W. MAITLAND, M.A.

OF LINCOLN'S INN, BARRISTER-AT-LAW
DOWNING PROFESSOR OF THE LAWS OF ENGLAND IN THE UNIVERSITY OF CAMBRIDGE.

London: C. J. CLAY & SONS,
CAMBRIDGE UNIVERSITY PRESS WAREHOUSE,
AVE MARIA LANE.
1888

[*All Rights reserved.*]

Digitized by Google

Br 168.88.5

~~VI 4039~~

HARVARD COLLEGE
FEB 18 1889
LIBRARY.

Sumner fund.

Br 168.88.5

HARVARD UNIVERSITY LIBRARY NOV 11 1971

Digitized by Google

INAUGURAL LECTURE.

THOUGH I am speaking for the first time in a new character, though I have before me the difficult task of trying to fill the place of one who was honoured by all who knew him and loved by all who knew him well, I yet have not the disadvantage—or should I say advantage?—of coming as a stranger to the Cambridge Law School. At any rate I mean to excuse myself on this occasion from any survey of the whole of the vast subject that has been committed to my care; rather I will make a few remarks about one particular branch of study, a branch that is very interesting to me, though I hope that I shall never overrate its importance. And if I have to say that it is not flourishing quite as it ought to flourish, believe me that this is said very modestly.

Our patience of centennial celebrations has been somewhat severely tasked this year, nevertheless it may be allowed me to remind you that next year will see the seven-hundredth birthday of English legal memory. The doctrine that our memory goes back to the coronation of Richard I. and no further is of course a highly technical doctrine, the outcome of a statute of limitation, capricious as all such statutes must be; still in a certain sense it is curiously true. If we must fix a date at which English law becomes

Digitized by Google

articulate, begins to speak to us clearly and continuously, the 3rd of September 1189 is perhaps the best date that we can choose. The writer whom we call Glanvill had just finished the first text-book that would become a permanent classic for English lawyers; some clerk was just going to write the earliest plea-roll that would come to our hands; in a superb series of such rolls law was beginning to have a continuous written memory, a memory that we can still take in our hands and handle. I would not for one moment speak slightingly of the memorials of an earlier time, only I would lay stress on the fact that before the end of the twelfth century our law is becoming very clear and well attested. When another century has gone by and we are in Edward I.'s reign the materials for legal history, materials of the most authoritative and authentic kind, are already an overwhelming mass; perhaps no one man will ever read them all. We might know the law of Edward's time in very minute detail; the more we know the less ready shall we be to say that there is anything unknowable. The practical limit set to our knowledge is not set by any lack of evidence, it is the limit of our leisure, our strength, our studiousness, our curiosity. Seven hundred years of judicial records, six hundred years of law reports; think how long a time seven centuries would be in the history of Roman Law.

Our neighbours on the continent are not so fortunate as we are. True that for some very early ages they have fuller memorials than we can show; but already in the eleventh century Domesday Book

Digitized by Google

stands out in its unique grandeur, and when our rolls of the King's Court begin in Richard's day, when our manorial rolls begin in Henry III.'s or John's, and our Year Books in Edward I.'s, then we become the nation whose law may be intimately known. Owing to the very early centralization of justice in this conquered country we acquired, owing to our subsequent good fortune we have preserved, a series of records which for continuity, catholicity, minute detail and authoritative value has—I believe that we may safely say it—no equal, no rival, in the world. And let those who think the twelfth century too late an age to be interesting, who wish for the law of more primitive times, consider how sound a base for their studies these records are. If once we were certain of our twelfth century we might understand Domesday, if once we understood the state of England on the day when the Confessor was alive and dead, then we might turn with new hopes of success to the Anglo-Saxon dooms and land-books.

I have said that our neighbours are less fortunate than we are; but perhaps that is not so, for hoarded wealth yields no interest. Of what has been done for the history of Roman law it is needless to speak; every shred of evidence seems to have been crushed and thrashed and forced to give up its meaning and perhaps somewhat more than its meaning. But look at the history of French law or of German law; it has been written many times on many different scales from that of the popular handbook to that of the erudite treatise, while the modern literature of monographs on themes of legal history is

Digitized by Google

enormous, a literature the like of which is almost unknown in England. For our backwardness it is some excuse, though hardly a sufficient excuse, that we are overburdened by our materials, are becoming always better aware at once of their great value and of their unmanageable bulk. A Romanist may be able to say about some historical problem—I know all the first-hand evidence that there is, nay, I know it by heart; the truthful English historian will have to confess that he has but flitted over the surface. On the other hand, if we compare the task of writing English legal history with that which French and German historians have before them, there is a fact which goes far to outbalance any disadvantage occasioned by the heavy weight of our materials. The early centralization of justice gives to our history a wonderful unity; we have not to compare the customs of divers provinces, or the jurisprudences of rival schools; our system is a single system and revolves round Westminster Hall.

Well, I am afraid that it must be allowed that Englishmen have not done all that might have been expected of them by those who do not know them well. I believe that no attempt has ever been made to write the history of English law as a whole. The praiseworthy work of Reeves on the law of the later middle ages was done at a dark time and is long out of date. In some particular departments very excellent work has been done; the constitutional law of the middle ages has been fully explored; the same may be said of the constitutional law of later days if we give to 'constitutional' a narrow meaning, and

Digitized by Google

much has been done for criminal law and real property law. But there are vast provinces which lie unreclaimed, not outlying provinces but the very heart of the country. For instance, take the forms of action, the core of English law; a history of them ought to be a most interesting book, dealing as it would have to deal with the evolution of the great elementary conceptions, ownership, possession, contract, tort and the like. Perhaps there are countries in which the writing of historical monographs has become a nuisance; but surely it is better to have too many than none at all. And then again, look at the state of the raw material, look at the hopeless mass of corruption that passes as a text of the Year Books, then look at Mr Pike's volumes and see what might be done. Then think of the tons of unprinted plea rolls. It is impossible to print them all; but think what ten men might do in ten years, by selecting, copying, indexing, digesting; the gain would be enormous, not merely for the history of English law, but for the history of law in general. There is so much to be done that one hardly knows where to begin. He who would write a general history thinks perhaps that his path should be smoothed by monographs; he who would write a monograph has not the leisure to win his raw material from manuscripts; but then only by efforts at writing a general history will men be persuaded that monographs are wanted, or be brought to spend their time in working at the rolls. And so we go round in a vicious circle.

There is I think some danger lest the history of English law should be better known and better taught

Digitized by Google

in other countries than in England. As regards the very oldest periods, 'the time beyond memory', this is no longer a danger but an accomplished fact. It gives us no surprise when we hear that a new edition of our oldest laws will be published by the Bavarian Academy; who else should publish the stupid things? And the process of annexation is being pushed further and further. Foreigners know that the history of our law has a peculiar interest. I am not speaking merely of political matters, but of our private law, law of procedure, criminal law; a great part of the best work that has been done has not been done by Englishmen. Of what has been done in America we will say nothing, for in this context we cannot treat the Americans as foreigners; our law is their law; at times we can even be cosmopolitan enough to regret an arrangement of the universe which has placed our records in one hemisphere and those who would make the best use of them in another. And all foreigners are welcome, Frenchmen and Germans and Russians; there is room enough and to spare; still we are the children of the kingdom and I do not see why we should cast ourselves out. But we are such a humble nation, we are. It is easy to persuade us that the early history of Roman law is interesting. To know all about the Roman formulary system, that is juristic science; to know anything about our own formulary system, which we only abolished the other day, that would be barbarian pedantry. But foreigners do not take this view.

A good deal, as it seems to me, depends upon our asserting our right, though it be no exclusive right. Think for a moment what lies concealed within the

Digitized by Google

hard rind of legal history. Legal documents, documents of the most technical kind, are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion. Take a broad subject—the condition of the great mass of Englishmen in the later middle ages, the condition of the villagers. That might be pictured for us in all truthful detail; its political, social, economic, moral aspects might all be brought out; every tendency of progress or degradation might be traced; our supply of evidence is inexhaustible: but no one will extract its meaning who has not the patience to master an extremely formal system of pleading and procedure, who is not familiar with a whole scheme of actions with repulsive names. There are large and fertile tracts of history which the historian as a rule has to avoid because they are too legal.

It need hardly be added that the science of comparative jurisprudence "if it ever exists" will involve the most elaborate study of particular systems of law, and among others assuredly of that system which has the most unbroken record. "If it ever exists":—I have used the cautious phrase used thirteen years ago by our Rede Lecturer, Sir Henry Maine. Of the great man who when that science exists will be honoured as its prophet, and its herald, of the great man whom we have lost, may I say this?—His wonderful modesty, his dislike of all that looked like parade or pedantry, the fascination of his beautiful style are apt to conceal the width and depth of his reading. He was much more than learned, but then

Digitized by Google

he was learned, very learned in law of all sorts and kinds. It is only through learning wide and deep, tough and technical, that we can safely approach those world-wide questions that he raised or criticize the answers that he found for them. What is got more cheaply will be guess-work or a merely curious collection of odds and ends, of precarious odds and questionable ends.

And now why is our history unwritten? In the first place, I think we may say, because of the traditional isolation of the study of English law from every other study, an isolation which is illustrated by the fact that it is only of late years, late years to us who have been dealing in centuries, that English law has had a home in the Universities. In 1850 when my predecessor Professor Amos came to the chair, the class of English law in this University consisted of one M.A., one B.A. and two undergraduates. At another time it may be interesting to account for this, to observe the formation of law schools in London while the Universities are teaching to ever fewer students a kind of law, Roman and Canon Law, which is not the law of the King's Courts, and becomes of ever less and less importance to the bulk of Englishmen. This process had momentous results and, all things considered, we cannot regret them. If the Universities had taught English law, English law would sooner or later have ceased to be English. But as it was, the education of the English lawyer—I speak of the later middle ages and of the Tudor time—was not academic; it was scholastic. It would be a great mistake to suppose that the lawyers of that age

Digitized by Google

got their law in the haphazard hand-to-mouth fashion that is familiar to us under the name of 'reading in chambers'. They went through an elaborate scholastic course which if not severe was at least prolonged—ten or twelve years of 'readings', 'mootings' and 'boltings', of hearing and giving lectures, and the path of scholastic success was the path to profit and to place. The law which this school evolved stood us in good stead: it was the bridge which carried us safely from medieval to modern times and we will speak well of it. But one thing it could not do, it could not possibly produce its own historian. History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history. And when the old scholastic plan of education broke down no other plan took its place. It is hardly too much to say that nobody taught law or attempted to teach it, and that no one studied law save with the most purely practical intentions. Whatever may be the advantages of such a mode of study it will never issue in a written history of English law.

The one great law book of the last century may serve to illustrate two points, though I have some hesitation about mentioning the first of them. Blackstone's work was the firstfruits of a professorship of law; in the presence of that book every professor of law will always feel very small, but there it stands the imperishable monument of what may be done by obliging a lawyer to teach law. But in the second place let us take one of Blackstone's greatest exploits, his statement of our land-law and of its history. Every one

Digitized by Google

now-a-days can pick holes in 'the feudal system' and some great writers can hardly mention it without loss of temper. But the theory of a feudal system it was that enabled Blackstone to paint his great picture, a picture incomplete and with many faults in it, but the first picture ever painted. Whence did he get the theory which made this possible? From Coke? Coke had no such theory and because he had none was utterly unable to give any connected account of the law that he knew so well. No, the feudal system was a very early essay in comparative jurisprudence, and the man who had the chief part in introducing the feudal system into England was Henry Spelman. It was the idea of a law common to all the countries of Western Europe that enabled Blackstone to achieve the task of stating English law in a rational fashion. And so it will be found during the length of our national life; an isolated system cannot explain itself, still less explain its history. When great work has been done some fertilizing germ has been wafted from abroad; now it may be the influence of Azo and now of the Lombard feudists, now of Savigny and now of Brunner. Let me not be misunderstood:—there is not much 'comparative jurisprudence' for those who do not know thoroughly well the things to be compared, not much 'comparative jurisprudence' for Englishmen who will not slave at their law reports; but still there is nothing that sets a man thinking and writing to such good effect about a system of law and its history as an acquaintance however slight with other systems and their history. One of the causes why so little has been done for our medieval law is I feel sure our very

Digitized by Google

complete and traditionally consecrated ignorance of French and German law. English lawyers have for the last six centuries exaggerated the uniqueness of our legal history by overrating and antedating the triumphs of Roman law upon the continent. I know just enough to say this with confidence, that there are great masses of medieval law very comparable with our own; a little knowledge of them would send us to our Year Books with new vigour and new intelligence.

In the second place it may seem a paradox, but I think it true, that the earlier ages of English law are so little studied because all English lawyers are expected to know something about them. In his first text-book the student is solemnly warned that he must know the law as it stood in Edward I.'s day, and unfortunately it is quite impossible to write the simplest book about our land-law without speaking of the *De Donis* and the *Quia Emptores*. Well, a stranger might exclaim, what a race of medievalists you English lawyers ought to be! But on enquiry we shall find that the practical necessity for a little knowledge is a positive obstacle to the attainment of more knowledge and also that what is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts. A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the

Digitized by Google

decision the more valuable for his purpose. That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority, and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better. This when stated is obvious; but often we conceal it from ourselves under some phrase about 'the common law'. It is possible to find in modern books comparisons between what Bracton says and what Coke says about the law as it stood before the statutes of Edward I., and the writer of course tells us that Coke's is 'the better opinion'. Now if we want to know the common law of our own day Coke's authority is higher than Bracton's and Coke's own doctrines yield easily to modern decisions. But if we are really looking for the law of Henry III.'s reign, Bracton's lightest word is infinitely more valuable than all the tomes of Coke. A mixture of legal dogma and legal history is in general an unsatisfactory compound. I do not say that there are not judgments and text-books which have achieved the difficult task of combining the results of deep historical research with luminous and accurate exposition of existing law—neither confounding the dogma nor perverting the history; but the task is difficult. The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms. If this

Digitized by Google

truth is hidden from us by current phrases about 'historical methods of legal study', that is another reason why the history of our law is unwritten. If we try to make history the handmaid of dogma she will soon cease to be history.

Macaulay in an amusing passage, amusing because it comes from him, has told us how "the historical "literature of England has suffered grievously from a "circumstance which has not a little contributed to her "prosperity..... A Frenchman", he says, "is not "now compelled by any strong interest either to "exaggerate or to underrate the power of the kings of "the house of Valois..... The gulph of a great "revolution completely separates the new from the old "system. No such chasm divides the existence of the "English nation into two distinct parts.... With us "the precedents of the middle ages are still valid "precedents and are still cited on the gravest occasions "by the most eminent statesmen.... In our country "the dearest interests of parties have frequently been "staked on the researches of antiquaries. The in-"evitable consequence was that our antiquaries con-"ducted their researches in the spirit of partisans." Well, that reproach has passed away; but the manipulation which was required to make the political precedents of the middle ages serve the turn of Whig or Tory was a coarse and obvious distortion when compared with the subtle process against which the historian of our law will have to be on his guard, the subtle process whereby our common law has gradually accommodated itself to changed circumstances. I make no doubt that it is easier for a Frenchman or a German

Digitized by Google

to study medieval law than it is for an Englishman; he has not before his mind the fear that he is saying what is not 'practically sound', that he may seem to be unsettling the law or usurping the functions of a judge. There are many good reasons for wishing that some parts of our law, notably our land-law, were thoroughly purged of their archaisms; of these reasons it is needless to say anything; but I am sure that the study of legal history would not suffer thereby. I do not ask for 'the gulph of a great revolution'; but it is to the interest of the middle ages themselves that they be not brought into court any more.

Are we to say then that the study of modern law and the study of legal history have nothing to do with each other? That would be an exaggeration; but it is true and happily true that a man may be an excellent lawyer and know little of the remoter parts of history. We can not even say that every sound lawyer will find an interest in them; many will; some will not. But we can say this, that a thorough training in modern law is almost indispensable for any one who wishes to do good work on legal history. In whatever form the historian of law may give his results to the world—and the prejudice against beginning at the end is strong if unreasonable—he will often have to work from the modern to the ancient, from the clear to the vague, from the known to the unknown. Of course he must work forwards as well as backwards; the stream must be traced downwards as well as upwards; but the lower reaches are already mapped and by studying the best maps of them he will learn where to look for the sources. Again I do not think that an Englishman

Digitized by Google

will often have the patience to study medieval procedure and conveyancing unless he has had to study modern procedure and modern conveyancing and to study them professionally.

This brings us to the heart of the matter. The only persons in this country who possess very fully one of the great requisites for the work are as a rule very unlikely to attempt it. They are lawyers with abundant practice or hopes of abundant practice; if they have the taste they have not the time, the ample leisure, that is necessary for historical research.

What then can the Universities do? Pardon me if I say that I do not answer this question very cheerfully. In the first place, the object of a law school must be to teach law, and this is not quite the same thing as teaching the history of law. We should not wish to see a professor of law breaking and entering the close of the professor of history, though the result of our scheme of Triposes may be that legal history falls to the ground between two schools. Secondly, I believe that any one who aspires to study legal history should begin by studying modern law. Could we dispose of the time and energies of the young man who is destined—surely he is born by this time—to tell the story of English law, we should advise him to pursue some such course of reading as that prescribed for our Tripos, to go into chambers and into court, even to do what in him lies to acquire some small practice; many other things he should do, but these should not be left undone. Thirdly, the time that we have at our command is exceedingly short. We can not reckon that an undergraduate will give so much as

Digitized by Google

two years to English law, and what he can learn in two years is not very much, regard being had to the enormous scope of our modern law. Fourthly, our students are many and teachers are few. Thus I have come to the conclusion, reluctantly for I have had my dreams, that in the ordinary teaching of our law school there is very little room for history, hardly any for remote history. At the same time every effort should be made which can possibly have the result of inducing a few students, those who will have taste and leisure for the work, to turn their thoughts towards the great neglected subject. They might at least learn to know where the evidence lies. May I mention my own case? I had not the advantage of studying law at Cambridge, otherwise perhaps I should not have been a barrister of seven years' standing before I had any idea of the whereabouts of the first-hand evidence for the law of the middle ages. It were to be wished that we had more prizes like the Yorke prize; already it has done more for the cause than any Tripos could do. It were to be wished that our doctor's degree had all along been reserved for those who had done some considerable thing for law or legal history:—but then what could we have done for potentates and politicians and such? Impossible to convict them of divinity or medicine, it was convenient to fall back on the legal principle that every one must be taken to know the law sufficiently well to be a doctor thereof.

Where then lies our trust? Perhaps in failure. Failure is not a pleasant word to use in the presence of youth and hope; it would be pleasanter to wish all our law students success in their chosen profession. But

Digitized by Google

let us look facts in the face. Only a few of the men who choose that profession succeed in it: the qualities which make a man a great lawyer are rare and the space on the wool-sack is strictly limited. The Cambridge law student should be prepared for either fortune. The day may come when in the bitterness of his soul he will confess that he is not going to succeed, when he is weary of waiting for that solicitor who never comes, when the prolonged and costly education seems thrown away. That is the hopeful moment; that is the moment when something that has been said here may bear its fruit. Far be it from us to suggest that there is but one outgo from the dismal situation; there are many things that a man can do the better because he knows some law. But in that day of tribulation may it be remembered that the history of English law has not been written. Perhaps our imaginary student is not he that should come, not the great man for the great book. To be frank with him, this is probable; great historians are at least as rare as great lawyers. But short of the very greatest work, there is good work to be done of many sorts and kinds, large provinces to be reclaimed from the waste, to be settled and cultivated for the use of man. Let him at least know that within a quarter of a mile of the chambers in which he sits lies the most glorious store of material for legal history that has ever been collected in one place, and it is free to all like the air and the sunlight. At least he can copy, at least he can arrange, digest, make serviceable. Not a very splendid occupation and we can not promise him much money or much fame—though let it be confessed that such humble

Digitized by Google

work has before now been extravagantly rewarded. He may find his reward in the work itself:—one can not promise him even that; but the work ought to be done and the great man when he comes may fling a foot-note of gratitude to those who have smoothed his way, who have saved his eyes and his time.

At the end of this long and dismal discourse let me tell a story. It is said that long ago a certain professor of English law was also the chief justice of an ancient episcopal franchise. It is said that one of his rulings was cited in the court presided over by a chief justice of a more august kind, the Lord Chief Justice of England. 'Did he rule that?' said my lord, 'why he is only fit to rule a copy-book.' Well, I will not say that this pedagogic function is all that should be expected of a professor of law; but still copy-books there ought to be and I would gladly spend much time in ruling them, if I thought that they were to be filled to the greater glory of the history of English law.

CAMBRIDGE: PRINTED BY C. J. CLAY, M.A. AND SONS, AT THE UNIVERSITY PRESS.

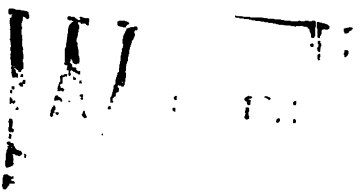
Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google



Digitized by Google